Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LYNN ALLAN JENKINS I.,
Petitioner,
V.

EIGHTH JUDICIAL DISTRICT'S CLERK OF THE COURT, SHANA WITBECK AND LEAD DEPUTY CLERK CHERYL WEEKS,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Utah

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do Utah's Court Clerks have a mandatory duty to comply with Utah's Rules of Civil Procedures, Code of Judicial Administration, and/or any other Constitutional or statutory law, when presented with pleading(s) for docketing and entry?

2. Did the Utah Supreme Court err in not granting petitioner's constitutional right to appeal from the Utah Courts of Appeal?

3. Did the Honorable A. Lynn Payne fail to comply with Utah Code of Judicial Conduct?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Utah Supreme Court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the Utah Court of Appeals appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the Utah Supreme Court decided my case was November 21, 1996. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Utah Supreme Court's jurisdiction in this matter is pursuant to the Utah Constitution Article VIII, Sections 3 and 5, Utah Code Annotated, § 78-3-30, and Utah Rules of Civil Procedures, Rule 65B(e)(2)(B), as amended.

1. Do Clerks of the Court have a mandatory duty to comply with Utah's Rules of Civil Procedures, Code of Judicial Administration, and/or any other Constitutional or statutory law, when

presented with pleading(s) for docketing and entry?

It is alleged that this is a question of "first impression", for the State of Utah. See: Riverton Citizens for Constitutional Government v. Beckstead, 631 P.2d 885 (Utah 1981), at footnote 4:

> We express no opinion on whether the mandamus remedy currently available under U.R.C.P. Rule 65B(b)(3) [amended 1994] or any other remedy would be available to compel action by a clerk who declined to perform his or her statutory function in time for the proponents of a petition to meet the deadline under Utah Code Annotated §20-11-24.

and UTAH CODE OF JUDICIAL ADMINISTRATION

Rule 3-302. Clerk of the Court.

Intent: To describe the role of the Clerk of the Court. To specify the procedure by which the Clerk of the Court is selected.
Applicability: This rule shall apply to the trial courts of record.

Statement of the Rule:

(1) The Clerk of the district and juvenile courts shall be appointed by the court executive with the concurrence of a majority of the judges assigned to that court location. In locations of the district court administered by contract with the

administrative office of the courts, the elected county clerk shall serve as Clerk of the Court.

(2) The Clerk of the Court shall:

(A) take charge of and safely keep the court seal;

(B) take charge of and safely keep or dispose of, according to law, all books, papers and records filed or deposited in the Clerk's Office;

(C) issue all notices, process and summonses where authorized by law;

(D) keep a record of all orders, judgments and decrees as required by law and this Code;

(E) keep minutes of court proceedings;

(F) keep a fee record as provided in this Code;

(G) keep records of jurors' services as provided in this Code;

(H) keep records of witnesses' attendance as provided in this Code;

(I) keep a record of executions as provided in this Code;

(J) take and certify acknowledgments and administer oaths;

(K) keep a record of fines, penalties, costs, and forfeitures as required by law and this Code;

(L) prepare revenue reports, reconcile accounting ledgers to bank statements, maintain and serve as custodian of trust accounts and perform such other accounting duties as assigned by the court executive;

(M) keep a record of court exhibits and ensure the safekeeping of exhibits;

> (N) supervise such deputy clerks as required to perform the duties specified in this rule;
>
> (O) keep such other records and perform such other duties as assigned by the court executive in accordance with applicable law and the provisions of this Code.

2. Did the Utah Supreme Court err in not granting petitioner's constitutional right to appeal from the Utah Courts of Appeal? The Utah Constitution Article VIII, Section 5 provides:

> The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

3. Did the Honorable A. Lynn Payne fail to comply with Utah Code of Judicial Conduct? It is not the first time Judge Payne has failed to do his duty as a judge, see: STATE v. PAYNE, 892 P.2d 1032 (Utah 1995);

> We agree with the State that the district court "failed to perform an act required by law as a duty of office" when it delegated the issue...,

and the Utah Code of Judicial Conduct provides:

Canon 3 B., Adjudicative Responsibilities.

> (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or permitted by rule, or transfer to another court occurs.
>
> ...
>
> (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and should not permit, and shall use all reasonable efforts to deter, staff, court officials and others subject to judicial direction and control from doing so. A judge should be alert to avoid behavior that may be perceived as prejudicial.
>
> ...
>
> (7) A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. A judge may consult with the court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge

does not abrogate the responsibility to personally decide the case pending before the court. No communication respecting a pending or impending proceeding shall occur between the trial judge and an appellate court unless a copy of any written communication or the substance of any oral communication is provided to all parties. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with the consent of the parties either in writing or on the record, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

...

Canon 3C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance

of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments, shall exercise the power of appointment impartially and on the basis of merit, and shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

STATEMENT OF THE CASE

This petition involves a civil action now pending before the Honorable A. Lynn Payne, Jr., in the Eighth Judicial District, Uintah County, Utah, Civil No. 930800100CN. The plaintiffs are H. Arvene Cooper, and his now deceased wife, Maurice N. Cooper, being represented by John C. Beaslin Esq., ("plaintiffs"); the defendants are M&J Construction Inc., a defunct Utah corporation, Edwin M. Higley and Afton C. Higley, his wife, being represented by Philip R. Hughes Esq., ("defendants"); and intervenor Lynn A. Jenkins I., pro se, ("petitioner").

The cause of action was filed by the plaintiffs on March 16, 1993. The complaint requested:

FIRST CAUSE OF ACTION

(1). $30,812.46 unpaid principal balance;
(2). $14,800.11 interest to and including January 1, 1993;
(3). 8% per annum on the principal balance until paid in full;
(4). Court to declare Exhibit "H", to complaint to be null and void;
(5). determine the Agreement dated December 30, 1986, is null and void for fraudulent amounts;
(6). determine M&J's President Edwin M. Higley had responsibility of determining correct balance due and owing; and
(7). attorney fees and cost.

SECOND CAUSE OF ACTION

(1). Court determine B.L.M. Permit owned by plaintiffs.

THIRD CAUSE OF ACTION

(1). Court determine personal liability of Edwin M. Higley and Afton C. Higley for taking real property in their names instead of M&J;
(2). determine M&J signed the Uniform Real Estate Contract Exhibit "B", to complaint; and
(3). for such other and further relief court seems just and proper.

June 10, 1993, after their attorney, John Michael Coombs filed a notice of withdrawal of

counsel the defendants, *pro se*, filed their answer and requested;

COUNTERCLAIM

(1). Defendants had collectively paid or caused to be paid over-payments [in] the amount of $85,872.56;

(2). plaintiffs to give Higleys a Warranty Deed to approximately 15.26 acres of Uintan County property, plus 19 shares of water, together with a title insurance policy on Uintah County property in the amount of $220,000.00;

(3). judgment against plaintiffs in the amount of $85,872.56, plus interest, at the rate of 12% per annum, commencing December 30, 1986;

(4). defendants have assigned all of their rights title and interest to Lynn Allan Jenkins I., pursuant to an "Absolute Assignment" dated July 30, 1991, and Quit Claim Deeds from Higleys to Jenkins, on November 1, 1991;

(5). dismissal as proper parties were not named;

(6). no cause of action upon which relief can be granted;

(7). complaint be dismissed with prejudice; and

(8). counterclaim costs.

September 3, 1993, plaintiffs assigned all of their rights, title and interests of this cause of action to their son Nelden Cooper, he being "responsible for cost, attorney fees, and any other cost relating to the lawsuit".

June 14, 1994, Nelden Cooper filed his "Notice of Interest" without a certificate of service.

July 19, 1994, Judge John R. Anderson, signed an order for filing an amended complaint, without a certificate of service being executed nor addressed to the defendants.

July 21, 1994, plaintiffs filed "Motion For Leave of Court to File Amended Complaint", without a certificate of service addressed to the defendants.

July 21, 1994, plaintiffs filed their amended complaint, without either a certificate of service addressed to defendants, nor exhibits attached. The plaintiffs are now seeking:

FIRST CAUSE OF ACTION

(1). $30,812.46 unpaid principal balance;
(2). $14,800.11 interest--Based on a Daily accrual of interest, Or $59,010.82--;
(3). 8% per annum on the principal balance until paid in full;
(4). declaration Exhibit "H", to complaint to be null and void;
(5). determine the Agreement dated December 30, 1986, is null and void for fraudulent amounts;
(6). determine M&J's President Edwin M. Higley had responsibility of determining correct balance due and owing; and
(7). attorney fees and cost.

SECOND CAUSE OF ACTION

(1). Determine amount of damages for recording deeds, EXHIBITS "G" AND "k"; and
(2). B.L.M. Permit owned by plaintiffs.

THIRD CAUSE OF ACTION

(1). Determine personal liability of Edwin M. Higley and Afton C. Higley for taking real property of (sic) Uintah Co., in their names before M&J had paid all the money it was obligated to pay;
(2). determine the personal (sic) liability of M&J;
(3). determine M&J signed (sic) the Uniform Real Estate Contract Exhibit "B", to complaint;
(4). determine Edwin M. Higley and Afton C. Higley, individually (sic) signed Memorandum Agreement and Exchange Agreement (Exhibit "C");
(5). for such other and further relief court seems just and proper; and
(6). "All exhibits on file with the original Complaint shall remain the same and are incorporated herein by reference thereto."

September 5, 1994, plaintiffs filed "Request for Hearing", without certificate of service to the defendants, requesting "a trial ... approximately two days."

August 7, 1995, Judge Anderson, upon his own motion, recused himself from the case since he

still had an on going partnership with the plaintiffs' attorney John C. Beaslin, and had failed to notify the defendants of this conflict of interest. Further Judge Anderson ordered that defendants were to be given a "New Trial", a copy of his "Memorandum Decision", is attached hereto as Appendix C. The Eighth Judicial District Court has only two judges, the other being Judge Payne.

August 22, 1995, Judge Payne granted the intervenor the right to intervene in the civil cause of action.

On or about September 20, 1995, the plaintiffs were served with petitioner's counterclaim seeking:

> (1) Judgment against plaintiffs in the total amount of $85,872.56 plus interest thereon at the rate of 12% per annum as of December 30, 1986;
>
> (2) Judgment for 2,070 shares of Ouray Park Irrigation Company's water stock;
>
> (3) A Warranty Deed for 215 acres presently held by the plaintiffs' agent; and
>
> (4) Attorneys fees; cost of suit and such other relief the Court deems proper.

October 31, 1995, the court held its hearing on the issues of the "New Trial" and stated its bench rulings of which no final order has been submitted by the plaintiffs as ordered by the court.

February 14, 1996, after plaintiffs had failed to respond in any manner to the intervention counterclaim, petitioner submitted to the

respondents for entry of a default judgment the following:

> I. "NOTICE OF DEFAULT", pursuant to Rule 55, Utah Rules of Civil Procedures, for plaintiffs' failure to respond to petitioner's counterclaim;
>
> II. "DEFAULT JUDGMENT" as prayed for in the counterclaim; and then
>
> III. Respondent Weeks' stated to petitioner that the Eighth Judicial District's procedures required a single document titled "CERTIFICATE OF DEFAULT AND DEFAULT JUDGMENT" so petitioner prepared two new judgments styled the same. One being without intervener's signature or mailing certification and the other with his signature and mailing certification.

Petitioner returned to the Clerk's office about 1:45 pm. and was informed by respondent Weeks that Judge Payne had intervened and told her not to enter any default judgment.

The "COURT'S DOCKET" is attached to the petition as Appendix D, and in its pertinent part is the only court record as to why a default judgment was not entered:

> 2/14/96 LYNN JENKINS SUBMITTED A DEFAULT AND DEFAULT JUDGMENT TO THE COURT. THE CLERK CHECKED (sic) THE DOCKET TO DETERMINE WHETHER OR NOT AN ANSWER HAD BEEN FILED. THE CLERK NOTED THAT THERE WAS A A (sic) HEARING HELD ON 2/5/96 AND THAT THERE IS ANOTHER

> HEARING SET FOR MAY 23, 1996. THERE WAS ALSO AN ANSWER FILED ON 1/29/96 BUT THE DOCKET DOES (sic) NOT SPECIFY WHO FILED THE ANSWER. AS THE CLERK WAS LOOKING FOR THE FILE TO DETERMINE WHETHER OR NOT THE DEFAULT AND DEFAULT JUDGMENT SHOULD ENTER, JUDGE PAYNE RECESSED FROM COURT AND CAME INTO CLERK'S OFFICE. THE CLERK ASKED JUDGE PAYNE ABOUT THE CASE AND [he] INDICATED THIS MATTER WAS SET FOR HEARING AND ADVISED THE CLERK NOT TO ENTER THE DEFAULT AND DEFAULT HEARING (sic) AT THIS TIME.
> 2/14/96 MR. JENKINS RETURNED TO THE CLERK'S OFFICE AND THE CLERK INFORMED HIM THAT THE DEFAULT AND DEFAULT JUDGMENT HAD BEEN RECEIVED IN (sic) BY THE COURT BUT WOULD NOT BE ISSUED OR ENTERED AT THIS TIME PENDING THE HEARING ON 5/23/96.

Petitioner sought from the Utah Court of Appeals an order of mandate to the Clerks requiring them to enter, nunc pro tunc, intervener's February 14, 1996, Notice of Default and Default Judgment; or Certificate of Default and Default Judgment; supra, items "I", "II" or "III".

REASONS FOR GRANTING THE PETITION

The petitioner by law is entitled to the relief sought in his administrative petition to the Utah Court of Appeals. Further the Utah trial court lacks jurisdiction under the claimed contract of the plaintiffs, Exhibit B. to their complaint and purported amended complaint concerning Davis and Weber County property that is within the jurisdiction of the Second Judicial District, which was extinguished by Warranty

Deeds of December 26, 1977, and as recorded in August 1978. Not only have the plaintiffs been paid in full for their Uintah County property, they have failed to transfer all that defendants had bargained and paid for which was assigned to the petitioner, as a bona fide purchaser for value.

The issue of the B.L.M. Sheep permit is now pending before the United States Department of the Interior, Office of Hearing and Appeals, Arlington Virginia, Appeal No. IBLA 95-489, (UT-08-93-01), and the Utah courts lacks jurisdiction over petitioner's base property.

Petitioner's counterclaim rights of due process and equal protection by not having the default and default judgment against the plaintiffs entered has compounded litigation costs with other parties that have stolen petitioner's property under color of the Utah court's rulings.

If the plaintiffs believe the filings of the petitioner were in error then they are responsible to follow Utah's Rules of Civil Procedures, Code of Judicial Administration, Rules of Appellate Procedure, Constitutional and statuary law, not Judge Payne's ex parte communication to his Clerks on their behalf.

CONCLUSION

Petitioner finds it interesting, to say the least, how plaintiffs can file their complaints yet fail to do what the Utah courts have ordered, i.e. prepare an order of the court's October 31, 1995, bench rulings and timely respond to the

intervention counterclaim. Judge Anderson granted a "New Trial", however now it appears the Utah court has abused its discretion for a *"New Trial"* as for the due process rights of the petitioner, the court has shown exceptional privilege to the plaintiffs, has compounded the facts in the civil case far beyond any court rule or statute or equity.

WHEREFORE, petitioner had requested: (1) that the Utah Court of Appeals issue an Extraordinary Writ, requiring respondents to appear and defend their actions; (2) that the Court proceed to hear and determine the legality of such actions; (3) a determination that the Clerks have a lawful duty to the petitioner and the Clerks are to enter the default and default judgment against the plaintiffs Coopers, nunc pro tunc, as of February 14, 1996; (4) that petitioner have a judgment for his costs; (5) and for such other relief the Court deems proper.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lynn Allan Jenkins I.,
Petitioner pro se